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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2016-1017

CR-13-0099

Dontae Callen

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-11-2047)

On Return to Remand

WELCH, Judge.

This case is before this Court on return to remand after we affirmed Dontae Callen's three capital-murder convictions for the murders of Bernice Kelly, Quortes Kelly, and Aaliyah Budgess and remanded the case to the circuit court for that

court to amend its sentencing order to make specific findings of facts concerning the aggravating circumstances set out in § 13A-5-49(3), Ala. Code 1975, and § 13A-5-49(8), Ala. Code 1975. See Callen v. State, [Ms. CR-13-0099, April 28, 2017] ___ So. 3d ___ (Ala. Crim. App. 2017). The circuit court has complied with our instructions on remand, and we now address the propriety of Callen's sentences of death.

Application of § 13A-5-53, Ala. Code 1975

Callen was indicted for, and convicted of, three counts of capital murder for murdering Bernice Kelly, Quortes Kelly, and Aaliyah Budgess pursuant to one act or course of conduct, for murdering the three victims during the course of an arson, and for murdering a victim who was under 14 years of age; offenses defined as capital by § 13A-5-40(a)(9); 13A-5-40(a)(10); and 13A-5-40(a)(15). The jury, by a vote of 11 to 1, recommended that Callen be sentenced to death. The circuit court followed the jury's recommendation and sentenced Callen to death. The record reflects that Callen's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975.

The circuit court found the existence of three aggravating circumstances: (1) that the act that constituted the capital offense did create "a great risk of death to many persons" during its commission, § 13A-5-49(3), Ala. Code 1975; (2) that the murders were especially heinous, atrocious, or cruel as compared to other capital murders, § 13A-5-49(8), Ala. Code 1975; and (3) that Callen did intentionally cause the death of two or more persons by one act or pursuant to one scheme or course of conduct, § 13A-5-49(9), Ala. Code 1975.¹

In applying § 13A-5-49(3), Ala. Code 1975, the circuit court made the following findings of fact on remand:

"Aggravating circumstance number 3 -- § 13A-5-49(3) -- does apply as the act which comprised the capital offense did create a great risk of death to many persons during its commission. The evidence and testimony presented at trial and during the sentencing phase of the trial was that the location of the incident was an apartment house. The building wherein [Callen] set fire to the victim's murdered bodies and then walked away was home to several people. The fire was set in one apartment but could have easily spread throughout the building, per the evidence, where several other people were sleeping as it was the night time/early morning hours. Had it not been for a vigilant

¹No findings of facts were necessary on this aggravating circumstance because the jury's verdict in the guilt phase established this aggravating circumstance beyond a reasonable doubt.

neighbor, Jerreli Williams, who smelled the smoke of the fire from the victims' apartment more people would very likely have died from smoke inhalation, while they slept or been burned to death. Williams was able to wake his family and other building residents to get them up and out of the building. But for his actions there may have been more than three deaths as a result of Callen's criminal conduct."

(Remand record, C. 39.)

Our neighboring State of Florida has a similar aggravating circumstance.² In applying this aggravating circumstance to a defendant setting a fire at the scene of a murder, the Florida Supreme Court stated:

"We agree with the trial court's finding that defendant created a great risk of death to many persons when he set fire to the victim's bed. Setting the fire was clearly conduct surrounding the capital felony for which he is being sentenced. Mines v. State[, 390 So. 2d 332 (Fla. 1980)]. There were six elderly people asleep in the building in which the victim's condominium was located. This can be classified as many persons. Cf. Kampff v. State, 371 So.2d 1007 (Fla. 1979). In King v. State, 390 So.2d 315 (Fla. 1980), we held that by setting fire to the house in which the murder victim resided and in which no other person was present, the defendant had knowingly created a great risk of death to many persons because he should have reasonably foreseen that the blaze would pose a great risk to the neighbors as well as the firefighters and the police

²In Florida, the aggravating circumstance reads: "The defendant knowingly created a great risk of death to many persons." § 921.141(6)(c) F.S.A.

who responded to the call. In the present case, the fire posed a direct threat of death to those six elderly persons residing in the building as well as the neighbors, firefighters, and police responding to the call."

Welty v. State, 402 So. 2d 1159, 1164 (Fla. 1981). This aggravating circumstance was properly applied in this case.

The circuit court made the following findings of fact when applying the aggravating circumstance that the murders were especially heinous, atrocious, or cruel when compared to other capital murders:

"Aggravating circumstance number 8 -- § 13A-5-49(8) -- does apply in that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. The testimony at trial concerning each victim's death was as follows: Dr. Gary Simmons with the Jefferson County Coroner/Medical Examiner's Office testified that Bernice Kelly had a total of 18 stab wounds. All of the wounds were above the chest area and on the front and back areas of her body. Dr. Simmons testified that none of these wounds would have been rapidly fatal but all would have resulted in significant blood loss. Ms. Kelly also had superficial burn areas. Dr. Simmons could not testify as to whether the burns occurred before or after her death. However, he found no carbon monoxide levels in her lungs and blood, which tends to indicate she dies before the fire was started. Bernice Kelly's cause of death was multiple sharp-force trauma.

"Dr. Simmons testified that Quortes Kelly had more burned areas on his skin than his mother although the burn areas were superficial. His blood

alcohol level was .22. His body showed evidence of soot and he was fully dressed. His hands showed no evidence of any 'defensive' wounds or sharp-force trauma. Mr. Kelly had 33 sharp force trauma wounds on the front and back areas of his body and all above his upper chest regions. Many of Mr. Kelly's wounds were deep: one went through to his voice box, another to his backbone and yet another down into his lung. Dr. Simmons testified that while these injuries, which included several arteries, would have caused rapid death none would have caused instantaneous death. Quortes Kelly's cause of death was multiple sharp force trauma.

"Dr. Simmons testified that Aaliyah Budgess had 25 stab wounds to her neck and head areas, both front and back. She had no defensive wounds on her hands. Several of the wounds went all the way to her skull but none penetrated her skull. One such wound did cause skull fracture, which then caused her brain to swell. Two wounds cut through her jugular veins and another went all the way to her spinal chord and caused bruising there. Dr. Simmons further testified that one of her injuries would have been instantaneously fatal. Aaliyah Budgess's cause of death was multiple sharp force trauma. None of the victims had evidence of carbon monoxide or soot in their lungs indicating that their deaths were as a result of the vicious stab wounds suffered at the hands of the defendant. There is little doubt but that each of these victims died a horrific and painful death."

(Remand record, C. 40.) "We have approved the application of this aggravating circumstance when the testimony established that the victims were stabbed multiple times and that they had suffered before their death." Stallworth v. State, 868 So. 2d

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1128, 1175 (Ala. Crim. App. 2001). This aggravating circumstance was properly applied in this case.

The circuit court found as statutory mitigating circumstances: (1) that Callen did not have a history of prior criminal activity, § 13A-5-51(1), Ala. Code 1975 and (2) that Callen was 18 years of age at the time of the murders, § 13A-5-51(7), Ala. Code 1975. As nonstatutory mitigating circumstances the circuit court indicated that it considered the following: that Callen had been abandoned by his mother; that Callen had been moved from household to household for most of his life; that Callen had been in the Department of Human Resources' system for most of his life; that Callen had a low IQ; that Callen had been "diagnosed by Dr. Ron Meredith in preparation for the mitigating phase of the trial with mild or borderline mental retardation, borderline personality disorder, disassociative;" and that "Callen was from a low socio-economic status." (C. 122.)

We have independently weighed the aggravating circumstances and the mitigating circumstances as required by § 13A-5-53(b)(2), Ala. Code 1975, and are convinced, as was

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the circuit court, that death was the appropriate sentence for the vicious triple homicide Callen committed.

Neither is Callen's sentence disproportionate or excessive when compared to penalties imposed in similar multiple-homicide capital cases. See § 13A-5-53(b)(3), Ala. Code 1975. See also Bohannon v. State, [Ms. CR-13-0498, October 23, 2015] ____ So. 3d ____ (Ala. Crim. App. 2015); Mitchell v. State, 84 So. 3d 968 (Ala. Crim. App. 2010).

Last, as required by Rule 45A, Ala. R. App. P., we have searched the record for any error that may have adversely affected Callen's substantial rights and have found none.

Callen's convictions for three counts of capital-murder are due to be, and are hereby, affirmed.

AFFIRMED.

Windom, P.J., and Kellum, Burke, and Joiner, JJ., concur.